



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
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December 21, 2012

Kimberly Klerner
6615 Brotherhood Way
Fort Wayne, Indiana 46825

Re: Formal Complaint 12-FC-363; Alleged Violation of the Access to Public Records Act by the Tippecanoe County Assessor

Dear Ms. Klerner:

This advisory opinion is in response to your formal complaint alleging the Tippecanoe County Assessor ("Assessor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Douglas J. Masson, Attorney, responded on behalf of the Assessor. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on December 7, 2012 you submitted a written request to obtain a copy of the Income Works Evaluation Report for the March 1, 2012 assessment date for certain parcels of commercial property in Tippecanoe County. You provide that the Assessor used an income approach to value several of your client's commercial properties. When the County utilized Income Works, data that is specific to each property is entered into a worksheet to help arrive at an income approach value for the property. There is a subsequent worksheet/printout that determines a value for the property. Often, there are subjective fields that are utilized in the worksheet that may or may not be entered correctly. If a taxpayer feels that their property is over-assessed and the Income Works report was utilized to establish the assessment, the only way for the taxpayer to have an educated discussion on the property's assessment is to receive a copy of the report. Without the report, the ability to dispute the accuracy of the assessment is limited. You are not requesting any formulas or backup data, only the report utilized by the County to determine the assessment of the specific property.

On December 12, 2012, Mr. Masson responded in writing to your request and provided that the evaluation report was not a document maintained by the County. Rather, the report was a proprietary document maintained by Income Works. Income Works asserts that a copyright protection applies to the reports to which the County is allowed access to via its subscription service. Information from the report is used when compiling the Property Record Card. The Property Record Card may be obtained from

the Assessor's Office. Further, the March 1, 2012 assessed value and other parcel information maintained by the Assessor can be accessed at URL: <http://gis2.tippecanoe.in.gov/public>. Mr. Masson cited to two previous opinions of the Public Access Counselor which noted that a public agency would not violate the APRA by denying access to a record that maintains copyright protection. *See Opinions of the Public Access Counselor 03-FC-146 and 09-FC-227*. Mr. Masson stated that the report may possibly be obtained by making arrangements directly with Income Works.

In response to your formal complaint, Mr. Masson advised that the Auditor's December 12, 2012 denial of your request set forth the agency's position on this issue. However, Mr. Masson would note that your formal complaint referenced two worksheets, which is not accurate after discussing the issue with the Auditor. The practice of the Assessor's office is to log into a subscription website where the individual is presented with a screen containing an array of fields requesting information about the property with drop down menus relevant to those fields. After the fields are completed, the information is submitted to the website which then returns a valuation report for the property. The valuation is then incorporated into the Property Record Card. While it is technically possible for the Assessor's Office to print out the screen that is displayed after all fields are completed, this is not the practice of the Assessor's Office to print or otherwise maintain the record. In part, this is because Income Works claims a copyright to the document.

Mr. Masson maintained that in the context of an administrative hearing or court proceeding in resolving a taxpayer's challenge to the property assessment, the Assessor may have different obligations with respect to meeting burdens of proof, compiling information, and obtaining documents from third parties. However, these questions are distinct from the requirements of the Auditor under the APRA.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *See* I.C. § 5-14-3-1. The Assessor is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Assessor's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

Pursuant to the APRA, a "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemical based media, magnetic, or other machine readable media, electronically stored data, or any other material, regardless of form or characteristic. *See* I.C. § 5-14-3-2(n). The Auditor advised that a report is generated from the Income Works website after identifying information is submitted. From what has been provided, it is my opinion that the report generated from the Income Works



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website is considered a public record of the Auditor once it is received by the agency after filling out the relevant information on the subscription based website. As it is my opinion that the report is considered a public record under the APRA, an analysis must be made on whether the Auditor's denial of the request was proper.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

The Auditor denied your request for access to the record noting that it was prevented from disclosing the record as it was copyrighted by Income Works. I.C. § 5-14-3-4(a)(3) provides that an agency may not disclose records declared confidential by federal law unless access to the record is specifically required under the federal statute or ordered by a court under the rules of discovery. Under the strict letter of the APRA, the Auditor was required to cite to the relevant federal laws regarding copyright (e.g. 17

U.S.C. §§ 102, 106, *et seq.*) in denying your request, when referencing I.C. § 5-14-3-4(a)(3). As to the substance of the denial, as noted by the Auditor, prior advisory opinions issued by the Public Access Counselor's office have advised that an agency would not violate the APRA if releasing the record would violate applicable copyright laws. *See Opinions of the Public Access Counselor 03-FC-146, 09-FC-88, 09-FC-277.* As provided by the U.S. Copyright Office, copyright infringement occurs when a copyrighted work is reproduced, distributed, performed, public displayed, or made into a derivative work without the permission of the copyright owner. *See <http://www.copyright.gov/help/faq/faq-definitions.html#infringement>.* Income Works asserts that a copyright protection applies to the reports to which the County is allowed access to via its subscription service. The Fair Use Doctrine is an exception to the rule of copyright which allows limited use of the copyrighted material without receiving the assent of the copyright holder. The U.S. Copy Office provides the following guidance as to the Fair Use Doctrine:

“One of the rights accorded to the owner of copyright is the right to reproduce or to authorize others to reproduce the work in copies or phonorecords. This right is subject to certain limitations found in sections 107 through 118 of the copyright law ([title 17, U. S. Code](#)). One of the more important limitations is the doctrine of “fair use.” The doctrine of fair use has developed through a substantial number of court decisions over the years and has been codified in section 107 of the copyright law.

Section 107 contains a list of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair.

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for, or value of, the copyrighted work

The distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission.
<http://www.copyright.gov/fls/fl102.html>



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Counselor Davis opined that: “it appears that there is no basis upon which a public agency may deny a person a copy of a third-party copyrighted record that constitutes a fair use.” See http://www.in.gov/pac/informal/files/Lt.Governor_inquiry_by_Chad_Frahm_re_Tourism_Photos.pdf. I do not have enough facts before me to determine whether your intended use would fall under the Fair Use Doctrine of the federal copyright law, nor is the Public Access Counselor a finder of fact. From what has been provided, it is my opinion that the Auditor has sustained its burden to demonstrate that its denial of your request was proper under the APRA. As noted *supra* by Counselor O’Connor, before a Court challenging the agency’s denial, the Auditor would have to establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit.” See also I.C. § 5-14-3-9(f). Lastly, as noted by Mr. Masson, in an administrative or judicial action filed contesting the assessment of the property in question, the Auditor may be required and/or ordered by the Court to provide the record in question. However, as applicable to your APRA request, it is my opinion that the Auditor did not violate the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the report generated from the Income Works website is considered a public record of the Auditor once it is received by the Auditor after filling out the relevant information on the subscription based website. Further, it is my opinion that the Auditor has met its burden to demonstrate that its denial of your request pursuant to the applicable federal copyright laws was proper under the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage", written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Douglas J. Masson